Supreme Court, U.S.
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No. 92-1604

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SANFORD J. BERGER, et al.
Petitioners,

- vs -

CUYAHOGA COUNTY BAR ASS'N, et al.
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a federal fee-shifting statute is involved in federal court litigation, is the substantive law regulating the division of a settlement fund between the successful lawyer and his client exclusively federal, so that any state regulation of the fees its licensed lawyers may receive therein constitutues an infraction of the Supremacy Clause?

2. Is there an impingement of the Supremacy Clause, as well as a denial of federal constitutional due process due to a lack of prior notice, when permissible federal court activity of a lawyer is subsequently deemed to be impermissible by state disciplinary authorities?

3. Is state regulation of its licensed lawyers preempted by federal law when such regulation substantially interferes with and impairs the carrying out of the purposes and objectives of a federal statutory scheme?

4. Is a facially conclusive claim of federal

preemption, concerning a State's attempt to intrude into the federal domain, subject to the abstention principles set down in Younger v. Harris, 401 U.S. 37 (1971)?

5. Does Middlesex Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982), require federal court abstention from granting requested declaratory and injunctive relief when the underlying proceedings involve the enforcement of federal, not state, substantive standards?

6. Do prior federal court requests for declaratory and injunctive relief from state action become moot by the state's acting without subject-matter jurisdiction and/or failing to address properly presented federal issues, and the injury to the applicant persists?

7. Does the failure of a federal court to determine requests for declaratory and injunctive relief state action, following the completion of that state action wherein the

applicant did not have a full and fair opportunity to have his federal issues heard and decided by the state, constitute the effective denial of any forum wherein the applicant could have his federal issues decided, in violation of federal due process requirements and the First Amendment right to have access to the courts?

8. Are successful lawyers, who have acted in furtherance of the interests of the United States government, entitled to absolute federal official immunity from state regulation of their actions while involved in vindicating a federal statutory scheme?

9. Do the doctrines of Res Judicata and/or Collateral Estoppel apply to state disciplinary proceedings when the complaining party waived any objections he might have had to a settlement fund division in a federal civil rights case by not presenting his objections to the federal trial judge, who presided in his case from the outset, in the first in-

stance and in a timely manner?

10. Is the defense of absolute judicial or quasi-judicial immunity available to a local, non-integrated association of private lawyers when it engages in purely administrative and/or investigative activities prior to assuming a prosecutional role in a state attorney disciplinary proceeding?

11. Can private parties claim state action immunity, as a defense to federal anti-trust claims, when the State itself had no jurisdiction that could be delegated to those private parties, or when an impermissible risk of furthering personal interests exists?

12. Should this Court exercise its supervisory powers over the lower federal courts in order to vacate a decision of a federal Circuit Court of Appeals which twice failed to consider all of the properly presented Issues, and which failed to follow standards previously set down by this Court?

13. Do the irregularities referred to in

Question 11 constitute a violation of the protected rights of these Petitioners as guaranteed to them by the First and Fifth Amendments to the Constitution of the United States?

PARTIES

From the outset of these proceedings on January 23, 1990, Sanford J. Berger and Robert M. Fertel have been the plaintiffs and appellants.

The defendants and appellees have been: The Cuyahoga County Bar Ass'n, the Grievance Committee of the Bar Ass'n, Lawrence Turbow, Investigator for the Grievance Committee of the Bar Ass'n, J. Warren Bettis, Disciplinary Counsel for The Supreme Court of Ohio, the Board of Commissioners on Grievances and Discipline of The Supreme Court of Ohio, and The Supreme Court of Ohio.

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceedings Below v

Index of Authorities xi

Opinions Below 1

Jurisdictional Statement 2

Constitutional and Statutory Provisions 2

Statement of the Case 3

A. The Petitioners 3

B. Petitioners' underlying federal activity that gave rise to state disciplinary charges. 4

C. The proceedings in the state of Ohio 9

D. The proceedings in federal court. 13

E. Summation 15

Summary of Reasons for Granting the Writ 18

Reasons For Granting The Writ 19

1. The supervision of the relationship between an attorney and his client in a federal fee-shifting action must be exclusively within federal court jurisdiction so as to ensure the full enforcement of the rights protected by the federal act. 19

2. A state cannot impose disciplinary sanctions against its licensed lawyers for federal court conduct which is authorized, or has not been prohibited, by the federal court system. 24

3. State regulation of the fees an attorney may ask of his client in the settlement of a post-trial federal fee-shifting proceeding would significantly interfere with the accomplishment of the purposes and objectives of the involved federal Act by deterring competent counsel from handling such cases. 26

4. The principles of Younger abstention are not applicable when a state impermissibly intrudes into an exclusively federal domain. 31

5. The abstention principles set down in Younger and Middlesex are not furthered when the involved and underlying substantive law principles are exclusively federal. 33

6. An applicant's request for declaratory and injunctive relief from a federal court, against state court action, is not mooted

when the state court acted without jurisdiction; has failed to address properly presented federal issues, and the injury to the applicant persists. 36

7. When first state, and then federal courts fail to addresss properly presented federal issues by an applicant, then that applicant is denied the protection of the First and Fifth Amendments. 39

8. If private attorneys, who are urged by Congress to perform the duties of salaried government attorneys, are not provided with absolute federal official immunity from state regulation when performing those duties, then said state regulation is calculated to diminish the availability of competent private attorneys. 40

9. The involved federal trial judge is in the best position to determine the reasonableness of a requested fee, and a complaining party is required to file his objections with said judge, and obtain his ruling, as a condition

precedent to any subsequent complaint to state disciplinary authorities. 43

10. The common law basis for judicial or quasi-judicial immunity is not furthered by providing absolute immunity to private citizens, whose complained of actions are not intimately associated with the judicial phase of a state proceeding. 44

11. The basis for state action immunity -- federalism and state sovereignty -- are not fruthered by granting immunity to an association of private citizens when there is an impermissible risk that those citizens will further their own interests rather than the government's. 47

12. This Court, pursuant to its Rule 10.1(a) and (c), should exercise its supervisory powers to compel the U.S. Court of Appeals for the Sixth Circuit to adjudicate all unaddressed Issues in accordance with this Court's standards. 49

13. In order to assure that an appeal as of

right to a U.S. Circuit Court of Appeals is effective, so as to satisfy the First Amendment's access to the courts requirement and the Fifth Amendment's due process requirements, a United States Court of Appeals is obliged to address each properly presented Issue and to follow this Court's standards. 51

Conclusion 53

Appendix:

Opinion of the United States Circuit Court of Appeals for the Sixth Circuit, Case No. 91-4178, rendered on 1/11/93 A1-10

Order of the United States District Court, Northern District of Ohio, Eastern Division, Case No. 1:90CV119, filed on 9/19/91 A12-31

Order of the United States District Court, Northern District of Ohio, Eastern Divison, Case No. 1:90CV119, in response to plaintiffs' FRCP 59(e) motion, filed on 10/19/91. A32-39

United States Constitution:

Supremacy Clause, Art. VI, Cl. 2 A40

First Amendment A40

Fifth Amendment A40

42 U.S.C. §1988 A41

INDEX OF AUTHORITIES

CASES

Allied Tube and Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988) 48

Ambus v. Granite Board of Education, 975 F.2d 1555 (CA10,1992) 52

Baylson v. Disciplinary Counsel of the Supreme Court of Pennsylvania, 975 F.2d 102 (CA3,1992) 24

Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983) 40

Boddie v. Connecticut, 401 U.S. 371 (1971) 51

Boettcher v. Hartford Insurance Co., 927 F.2d 23 (CA1,1991) 25

Buckley v. Fitzsimmons, 952 F.2d 965 (CA7,1992), cert. gr'd __U.S.__, 113 S.Ct. 53 (1992) 46

Burns v. Reed, ___U.S.___, 111 S.Ct. 1934 (1991) 45

Butler v. Dowd, 979 F.2d 661 (CA8,1992) 23

CSXT, Inc. v. Pitz, 883 F.2d 468 (CA6,1989), cert. den'd 494 U.S. 1030 (1990) 32

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 505 (1971) 39,40

Cippolone v. Liggett Group, Inc., ___U.S.___, 112 S.Ct. 2608 (1992) 20

City of Riverside v. Rivera, 477 U.S. 561 (1986) 22

Columbia, South Carolina v. Omni Outdoor Advertising, Inc., ___U.S.___, 111 S.Ct. 1344 (1990) 47

Commissioner, I.N.S. v. Jean, 496 U.S. 154 (1990) 23

Church of Scientology of California v. United States, ___U.S.___, 113 S.Ct. 447 (1992) 38

Cowan v. Prudential Life Insurance Co., 935 F.2d 522 (CA2,1991) 21

Cupp v. Naughton, 414 U.S. 141 (1973) 50

Dague v. Burlington, 976 F.2d 801 (CA2,1991) 23

F.D.I.C. v. Moitie, 452 U.S. 394 (1981) 44

F.T.C. v. Tricor Insurance Co., ___U.S.___, 112 S.Ct. 2169 (1992) 36

Ferri v. Ackerman, 444 U.S. 193 (1980) 41,42

Fidelity Federal Savings & Loan Ass'n v. De la Cuesta, 458 U.S. 141 (1982) 27

Forester v. White, 484 U.S. 219 (1988) 44

Gade v. National Solid Wastes Management Ass'n __U.S.__, 112 S.Ct. 2374 (1992) 15,24,30,31,50

General Oil Co. v. Crain,
209 U.S. 211 (1908) 39

Goldfarb v. Virginia State Bar Ass'n,
421 U.S. 773 (1975) 47

Hagans v. Lavine, 415 U.S. 528 (1974) 33

Haring v. Prosise, 462 U.S. 306 (1983) 37

Hensley v. Eckerhart,
461 U.S. 424 (1983) 23,41

Houston v. Partee,
978 F.2d 362 (CA7,1992) 46

Huffman v. Pursue Limited,
420 U.S. 592 (1975) 34

Imbler v. Pachtman, 424 U.S. 409 (1976) 45

In Re American Airlines, Inc.,
972 F.2d 605 (CA5,1992), cert. den'd
___U.S.___, 113 S.Ct. ___ (1993) 20

In Re Apex Oil Co.,
980 F.2d 1150 (CA8,1992) 33

In Re Bradley, 74 U.S. 364 (1868) 20,34

In Re Pan American Airlines Corp.,
950 F.2d 839 (CA2,1991) 33

In Re Ruffalo, 390 U.S. 545 (1968) 21,25

In Re San Juan Dupont Plaza Hotel
Fire Litigation,
768 F. Supp. 912 (D,PR,1991), rev'd
on other grnds 982 F.2d 603 (CA1,1992) 29

In Re Snyder, 472 U.S. 634 (1985) 19

International Paper Co. v. Ouellette,
479 U.S. 481 (1978) 28

Jones v. Rath Packing Co.,
430 U.S. 519 (1977) 27

Joseph v. Patterson,
795 F.2d 549 (CA6,1985) 46

Juidice v. Vail, 430 U.S. 327 (1977) 35

Kay v. Ehrler,
___U.S.___, 111 S.Ct. 1435 (1991) 21,28

Kirchoff v. Flynn,
786 F.2d 320 (CA7,1986) 21

E.J. Leizerman v. Toledo Bar Ass'n,
Petition for Writ of Certiorari,
Case No. 92-1266 12

Logan v. Zimmerman Brush Co.,
455 U.S. 422 (1982) 52

Loudermill v. Cleveland Bd. of Education,
721 F.2d 550 (CA6,1983),
aff'd 470 U.S. 532 (1985) 4

Mathewson Corp. v. Allied Industries, Inc
827 F.2d 850 (CA1,1987) 22

Middlesex County Ethics Comm. v. Garden
State Bar Ass'n,
457 U.S. 424 (1982) 14,33,34,37

Mills v. Green, 159 U.S. 651 (1895) 38

Milwaukee v. Illinois, 451 U.S. 304 (1981) 22

Moore v. Sims, 442 U.S. 415 (1979) 35

New Orleans Public Service, Inc. v. Council of the City of New Orleans, 491 U.S. 350 (1989) 31,32,37

New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980) 22

Ohio Civil Right Comm. v. Dayton Christian Schools, 477 U.S. 619 (1986) 34,35

Ohio-Sealey Mattress Manufacturing Co. v. Sealy, Inc., 776 F.2d 646 (CA7,1985) 43

Ortiz v. Regan, 980 F.2d 138 (CA2,1991) 23

Pfeifer v. Sentry Insurance, 745 F. Supp. 1435 (ED,Wisc,1991) 43

Pennsylvania v. Delaware Valley Citizens Council For Clean Air, 478 U.S. 546 (1986) 23

483 U.S. 711 (1987) 21,26

Pennzoil Co. v. Texaco, 481 U.S. 1 (1987) 35

Pierce v. Underwood, 487 U.S. 552 (1988) 23

Robinson v. Ariyoshi, 753 F.2d 1468 (CA9,1985) 36

Romberg v. Nichols, 970 F.2d 512 (CA9,1992), vac'd on other grnds, __U.S.__, 113 S.Ct. 1038 (1993) 21

Sanford J. Berger v. The Supreme Court of Ohio, 598 F. Supp. 69 (SD,Ohio, 1984) 4

Securities Industry v. Clarke, 898 F.2d 318 (CA7,1990) 25

Sprague v. Ticonic National Bank,
307 U.S. 161 (1939) 44

Testa v. Katt, 330 U.S. 368 (1947) 39

Trainor v. Hernandez,
431 U.S. 434 (1977) 34,35

United States v. Gillock,
445 U.S. 360 (1980) 35

United States v. Hastings,
461 U.S. 499 (1983) 50

United States v. Vague,
697 F.2d 805 (CA7,1983) 43

United States Catholic Conference v.
Abortion Rights Mobilization, Inc.,
487 U.S. 72 (1988) 37

Venegas v. Mitchell, 495 U.S. 82 (1990) 25,31

Willy v. Coastal Corp.,
___U.S.___, 112 S.Ct. 1076 (1992) 44

Wisconsin Public Intervenor v. Mortier,
___U.S.___, 111 S.Ct. 2476 (1991) 28

Woods v. Orange County,
715 F.2d 1543 (CA11,1983) 39

Young v. United States, ex rel.
Vuitton et Fils S.A.,
481 U.S. 787 (1987) 48,49

Younger v. Harris, 401 U.S. 37 (1971)
31,33,34,37

Zauderer v. Disciplinary Counsel of The
Ohio Supreme Court,
471 U.S. 626 (1985) 48,49

CONSTITUTIONAL PROVISIONS

Supremacy Clause, Art. VI, Cl. 2 33

First Amendment 39,40

Fifth Amendment 39

STATUTES

42 U.S.C. §1983 4,13

42 U.S.C. §1988 7,21,22,25,27,28

RULES

U.S. Supreme Court Rule 10.1(a)&(c) 49

F.R.A.P. 46(b)&(c) 17

Sixth Circuit Rule 32(h) 17

In The
Supreme Court of the United States

October Term, 1992

No. 92 -

SANFORD J. BERGER, et al.

Petitioners

- vs -

CUYAHOGA COUNTY BAR ASS'N, et al.

Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Sixth Circuit is reported at 983 F.2d 718, and is reproduced in the Appendix at pages A1-11. The opinion of the federal district court is reported at 775 F. Supp. 1096 (ND,Ohio,ED,1991) and is repro-

duced in the Appendix at pages A12-31. The Order denying a F.R.C.P. 59(e) motion is unreported and reproduced in the Appendix at pages A32-39.

JURISDICTION

The decision of the Circuit Court of Appeals for the Sixth Circuit was issued on January 11, 1993. A timely Petition For Rehearing With Suggestions For Rehearing En Banc was denied, without Opinion, on March 12, 1993. This Court has jurisdiction under the provisions of 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners rely on the First Amendment and Fifth Amendment to, and the Supremacy Clause in Article VI of, the Constitution of the United States, which are set forth in the Appendix at A40.

The attorney's fee provision of 42 U.S.C. §1988 is argued herein, and is set forth in the Appendix at page A41.

STATEMENT OF THE CASE

A. The Petitioners

The petitioners, Sanford J. Berger and Robert M. Fertel, were licensed to practice law by the state of Ohio in 1952 and 1972 respectively, and admitted to practice in federal court in 1963 and 1974 respectively. During March, 1981, they associated, and had unblemished professional reputations until the incidents of this appeal commenced on March 7, 1989.

Their practice has centered around federal fee-shifting litigation essentially, but they were also one of the few firms in Cuyahoga County, Ohio who were willing to represent litigants aggrieved by attorney malpractice or constitutional violations. In fact, the first attorney appointed by the respondent Cuyahoga County Bar Ass'n (Bar) as an Investigator of their professional conduct was a defendant in a then-pending lawsuit. Nor were they ever members of the subject Bar.

Some of the highpoints in their practice was the decision in Sanford J. Berger v. The Supreme Court of Ohio, 598 F. Supp. 69 (SD,Ohio,1984), which favorable language therein governed all subsequent judicial campaigns in Ohio. They were also pleased with the decision in Loudermill v. Cleveland Board of Education, 721 F.2d 550 (CA6,1983), which was later affirmed by this Court, 470 U.S. 532 (1985).

Because of the many unique and unprecedented federal constitutional questions they sought to have addressed in their federal actions, they have been obliged to engage in extensive federal appellate work.

B. Petitioners' underlying federal activity that gave rise to state disciplinary charges.

As a direct consequence of their publicized success in Loudermill, a Daniel Gurish (Gurish) came to their office during Dec., 1983 with a §1983 case that had been prepared by another attorney; summary judgment had

been granted against him, and he asked if we would take an appeal to the Sixth Circuit Court of Appeals. Gurish had been a Corrections Officer who had been discharged for beating a feeble-minded inmate assigned to his care, and then covering up the beating in his Duty Report. As such, the possibilities of his succeeding at any possible future trial were exceedingly remote and speculative.

We explained to Gurish that appeals cost money; cannot be taken on a contingency basis, and that we charged $200 an hour for appellate work. Assuring us that he had resources for the cost of the appeal, we then appealed to the Sixth Circuit and the matter was reversed and remanded. Upon remand, a second summary judgment was granted against him after our lengthy and time-consuming opposition, and a second appeal had to be taken wherein we were again successful.

At that point in time, and irrespective of any trial representation, Gurish owed us

$40,000 less $2,500 he had given us. We then entered into a 50%-50% contingent fee contract with him for trial representation.

The case went to trial on 7/28/88; and after five days of trial, the jury returned a surprise verdict of $100,000. The trial court then entered its judgment for $100,000 plus reasonable attorney fees. Our filed Petition For An Award Of Attorney Fees, with supporting schedules, asked for $191,000 thereafter. After a one-day hearing before a Magistrate on 2/3/89 (wherein our Expert testified as to the reasonableness of our requested fee), the County made a package offer of $130,000 on 2/9/89 to settle both the now-appealed judgment and our attorney fee claims -- which offer was unacceptable to us, but which we were ethically obliged to convey to Gurish.

Representing that he was in dire need of money and could not wait for the appealed judgment to be decided, Gurish demanded that we immediately accept the offer on his behalf,

and it was agreed that the split would be one-half of the judgment amount ($50,000) for him and $80,000 for us to satisfy his two pre-trial appeals and trial obligations owing to us. Of course, that aborted any chance for an award of attorney fees to us by the court, and an entry was then made that the case was "Settled and dismissed."

At that point in time, we were totally satisfied that the settlement division was in complete compliance with federal standards regarding what constituted a reasonable fee under 42 U.S.C. §1988.

Between the time of our agreed-upon division of the settlement fund to the actual receipt of the funds, Gurish voiced no objection as to the division to the federal trial judge or us. However, when the funds were received and Gurish's endorsement required on a check, Gurish reneged on our agreement; demanded 50% of the total settlement fund, and when we refused to agree to his surprise

demand, we were discharged by Gurish and he obtained new counsel. As such, we retained a settlement check that Gurish refused to sign, as one of the payees thereon, so that it could be negotiated.

Gurish then filed a dubious "Motion To Cease and Desist" with the federal trial judge, who refused to intervene in the dispute, and dismissed Gurish's motion on the basis that he no longer had jurisdiction due to his having closed the case. Gurish took no appeal from that adverse ruling.

Even though the involved federal court had its own disciplinary procedures; had never adopted Ohio's Code of Professional Responsibility or delegated its exclusive disciplinary authority to the state of Ohio, Gurish chose not to file disciplinary charges against us in federal court. Rather, he opted to fle a disciplinary complaint against Berger with the respondent Bar on 3/7/89 wherein he claimed that Berger was: "Shaking

him down!" ... "Strong arming him!" and "I'm being raped by my attorney, and question whether he really has my best interest at hart [sic]."

C. The proceedings in the state of Ohio.

Thereafter, the Bar's 50 member Grievance Committee conducted an "Investigatory Hearing," and eventually they filed Disciplinary Complaints against us with the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio (Board) wherein we were charged with "charging an excessive fee," "failing to pay to a client funds which the client is entitled to receive," and two other charges. In the Bar proceedings, we raised our federal constitutional and statutory claims, but they were never responded to.

During June, 1989, Gurish then brought suit against us in state court wherein he sought declaratory relief; we raised our federal constitutional and statutory claims against the state court assuming jurisdiction

to determine what a reasonable fee should be, but all to no avail. On 5/30/90, the state trial judge persuaded Gurish and us to resolve and settle the state suit, a pending federal suit against Gurish and his new lawyer, as well as the state disciplinary proceedings, by splitting the settlement fund on a 50%-50% basis. Gurish and his lawyer were then dismissed as defendants in the federal suit; Gurish endorsed the check and received $65,000; the state suit was dismissed, and Gurish sent a letter to the Bar asking withdrawal of his disciplinary Complaint.

As a result of Gurish's letter to the Bar, the disciplinary proceedings were expanded by the Bar filing an Amended Complaint wherein a new Count was added: "Failure to assist in the investigation of a Complaint."

Separate Motions To Dismiss both the Complaint and Amended Complaint were made on the bases of lack of subject-matter jurisdiction, federal preemption, federal official

immunity, and res judicata, but those two motions were never ruled upon by the Ohio Supreme Court (as the final decision-maker), even though we made three separate requests for such a ruling.

The Board's Report and Recommendation came one year after the hearing and recommended that we be suspended for one year. We then moved the Ohio Supreme Court for an extension of time to file Additional Objections to the Report on the ground that, in order to have a meaningful opportunity to respond as required by federal constitutional due process, the short time allowed by the Ohio Supreme Court was not adequate. Our request was denied without explanation.

Shortly thereafter, we sought to present the Ohio Supreme Court with the federal standards for the determination of a reasonable attorney's fee by a Motion To File Additional Objections Instanter, and tendered those Additional Objections. That Motion was also

overruled without explanation.

As such, the Ohio Supreme Court never ruled upon its challenged subject-matter jurisdiction or the federal issues we presented for resolution. That the Ohio Supreme Court avoids addressing properly presented federal issues in a state disciplinary proceeding can be further illustrated by this language from the Petition For A Writ Of Certiorari in E.J. Leizerman v. Toledo Bar Ass'n, No. 92-1266, at page 10:

> Petitioner's federal challenges under the First and Fourteenth Amendment and the Supremacy Clause (and other arguments) were then presented to the Ohio Supreme Court. ... The Court did not discuss the claims.
>
> On September 23, 1992, respondent filed a motion for reconsideration based on the Ohio Supreme Court's failure to discuss his preemption and other constitutional challenges. A35. The motion was denied, without opinion, on October 28,1992. A15.

On September 2, 1992, the Ohio Supreme Court issued its Order suspending us from the practice of law for one (1) year plus payment of costs amounting to $2,117.92.

Our Petition For A Writ of Certiorari To The Supreme Court Of Ohio, No. 92-887, was denied by this Court on January 19, 1993.

D. The proceedings in federal court.

On January 23, 1990, during the Bar's investigation, we filed a federal civil rights action, pursuant to 42 U.S.C. §1983, against the Bar, the Ohio Supreme Court and its Board, Ohio's Disciplinary Counsel, and Gurish and his new attorney. That Complaint only requested monetary damages from the Bar defendants (and among our claims was a claim of a federal anti-trust violation), as well as Gurish and his new attorney.

In that Complaint, we also sought declaratory and injunctive relief against all of the defendants based upon lack of subject-matter jurisdiction, federal preemption, federal official immunity and res judicata.

On September 19, 1991, the federal district court granted the defendants' Motions To Dismiss, by holding that the state attor-

ney disciplinary proceedings were not pre-empted by the federal Civil Rights Act; that it was required to abstain pursuant to this Court's decision in Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 424 (1982), and that the Bar defendants were immune from monetary liability.

We then filed an appeal to the Sixth Circuit Court of Appeals, which affirmed the district court's dismissal, on January 11, 1993. In its decision, the Sixth Circuit held that federal court abstention, pursuant to Middlesex, was required; that there was no case holding that federal ethical standards prevail over state ethical standards, and that the prior completion of the state disciplinary proceedings rendered our requests for declaratory and injunctive relief moot.

The Sixth Circuit decision also held that the Bar defendants were entitled to judicial and state action immunity from our claims for monetary relief.

Issues presented to the Sixth Circuit by us that were not addressed were the issues of federal official immunity, res judicata, and the need to consider if the state proceedings created an impermissible effect on the federal civil rights statutory scheme, as set down in this Court's decision in Gade v. National Solid Wastes Management Ass'n, ___ U.S.___, 112 S.Ct. 2374 (1992).

In our Petition For Rehearing With Suggestion For Rehearing En Banc, we pointed out the above omissions, and also made claim that the decision was contrary to cited decisions of this Court, other Circuit Courts of Appeals, as well as prior Sixth Circuit decisions.

Our Petition For Rehearing With Suggestion For Rehearing En Banc was overruled by the Sixth Circuit on March 12, 1993.

E. Summation.

When our client forced us to accept the package offer of $130,000 for both his then-

appealed judgment and our claim for a reasonable attorney's fee, and the federal trial judge refused to intervene, we found ourselves in a most nightmarish situation from which we could not extricate ourselves. First, our client determined what was to be our reasonable fee; then a state trial court determined what was to be our reasonable fee; and finally, the Ohio Supreme Court determined what constituted a reasonable fee.

All told, these post-federal trial court proceedings during the past four years have forced us to expend nearly 3,000 hours in attempting to defend ourselves, and have immobilized us insofar as undertaking the representation of other federal litigants since 1989.

Further, our one-year suspensions by the Ohio Supreme Court has destroyed our reputations and professional careers, as we are now obliged to wear, in perpetuity, the public badge of "SHYSTER."

On March 23, 1993, the United States Court of Appeals for the Sixth Circuit entered its Orders striking our names from the rolls of those attorneys authorized to practice law in that Court. This action was taken despite our prior and timely request on October 10, 1992 that we be afforded a hearing pursuant to the mandatory requirements of F.R.A.P. 46(b)&(c) and Sixth Circuit Rule 32(h).

Our suspensions from the United States District Court for the Northern District of Ohio, Eastern Division, is expected to soon occur; and likewise, without being afforded the opportunity for a hearing.

Suspensions from both courts being solely based upon our suspensions by the Ohio Supreme Court.

SUMMARY OF REASONS FOR GRANTING THE WRIT

Three federal district judges and all of the judges of the Sixth Circuit Court of Appeals believe that a State has concurrent jurisdiction with federal courts to supervise its licensed attorneys (when they are engaged in a federal statutory fee-shifting proceeding in a federal court), by being able to review the reasonableness of the attorney's fee, asked of a client, in that federal proceeding.

The inherent and obvious danger in the decision appealed from is that even if a federal judge determines the reasonableness of a requested fee, a State now has the right to second-guess that determination; and if the State disagrees, then it has the right to sanction its licensed lawyers. Any lawyer involved in federal fee-shifting litigation, therefore, is now in jeopardy of having to spend more time justifying his fee in the State than he spent in earning that fee in

To be safe then, federal practitioners in the Sixth Circuit should first submit a contemplated attorney's fee to their State for its prior approval before requesting that fee in a federal proceeding.

Further, private clubs of lawyers dispersed throughout the 88 counties of Ohio have been given the discretion, by the Ohio Supreme Court, to decide who may, or may not, compete with them in their geographic area, and their decision is invariably approved by the Board and the Ohio Supreme Court.

REASONS FOR GRANTING THE WRIT

1. THE SUPERVISION OF THE RELATIONSHIP BETWEEN AN ATTORNEY AND HIS CLIENT IN A FEDERAL FEE-SHIFTING ACTION MUST BE EXCLUSIVELY WITHIN FEDERAL COURT JURISDICTION SO AS TO ENSURE THE FULL ENFORCEMENT OF THE RIGHTS PROTECTED BY THE FEDERAL ACT.

The ethical standards for federal court attorneys are matters of federal law, In Re Snyder, 472 U.S. 634,645 n.6 (1985), and any

contrary state standards must be considered to be without effect. Cippolone v. Liggett Group, Inc., __U.S.__,__, 112 S.Ct. 2608,2617 (1992) (plurality opinion).

Even when a federal court adopts state ethical standards, how those standards are applied are matters of federal law. In Re American Airlines, Inc., 972 F.2d 605,610 (CA5,1992), cert. den'd 113 S.Ct. __, (1993).

One of the oldest legal doctrines in American law is that one court does not have jurisdiction to disbar an attorney for acts of contempt committed in another court. In Re Bradley, 7 Wall 364, 74 U.S. 364,372 (1868). By the same logic, therefor, claimed acts of wrongdoing in a federal court proceeding are purely federal in nature, and the Ohio Supreme Court had no jurisdiction, from the outset, to interpose its judgment for that of the involved federal judge.

Whether the requested fee was "excessive" turns upon whether federal or state standards

are applied, but it was not that type of conduct that is generally condemned by lawyers. In Re Ruffalo, 390 U.S. 545,555 (1968). (White, J., concurring).

Our case involved a federal fee-shifting statute, 42 U.S.C. §1988, whose overriding concern is to obtain sufficiently competent counsel to handle federal civil rights actions, Kay v. Ehrler, __U.S.__, 111 S.Ct. 1435,1437 (1991), by guaranteeing a reasonable fee to an attorney if he is successful in obtaining relief for his client. Pennsylvania v. Delaware Valley Council For Clean Air, 483 U.S. 711,726 (1987).

Moreover, since federal civil rights actions are fundamentally different from ordinary civil actions, Kirchoff v. Flynn, 786 F.2d 320,326 (CA7,1986); Cowan v. Prudential Life Insurance Co., 935 F.2d 522,526 (CA2, 1991), and Romberg v. Nichols, 970 F.2d 512, 519 (CA9,1992), vac'd on other grnds __U.S. __, 113 S.Ct. 1038 (1993), the perspective as

to wrongdoing likewise must differ.

Since §1988 is silent as to preemption, and where there exists a "[s]ignificant conflict between some federal policy or interest and those of state law," the federal courts have found it necessary in a "[f]ew and restricted instances" to develop a federal common law. Milwaukee v. Illinois, 451 U.S. 304, 313 (1981). Since this case involved the settlement of a federal court action wherein the interests are preeminently federal in nature, it should be determined according to federal common law principles. Mathewson Corp v. Allied Industries, Inc., 827 F.2d 850,853 n.3 (CA1,1987).

A dominant federal interest exists herein because a federal stautory scheme of the highest priority was involved. New York Gaslight Club, Inc. v. Carey, 447 U.S. 54,63 (1980) and City of Riverside v. Rivera, 477 U.S. 561,575 (1986).

It was the determination of Congress that

if a potential federal civil rights plaintiff is unable to obtain competent counsel to represent him, then many legitimate claims will go unvindicated. Pennsylvania v. Delaware Valley Citizens Council for Clean Air, 478 U.S. 546,565 (1986).

As such, in the interests of sound judicial administration, the court that is in the best position to determine an issue should make resolve that issue. Pierce v. Underwood, 487 U.S. 552,559-60 (1988).

This Court has held that the involved federal district court judge is in the best position to determine the reasonableness of a requested fee. Hensley v. Eckerhart, 461 U.S. 424,437 (1983) and Commissioner, I.N.S. v. Jean, 496 U.S. 154,161 (1990). Recently, the decisions in Butler v. Dowd, 979 F.2d 661,676 (CA8,1992); Ortiz v. Regan, 980 F.2d 138,141 (CA2,1992), and Dague v. Burlington, 976 F.2d 801,804 (CA2,1991).

The Sixth Circuit decision, at A10, stated

as follows:

> ...we know of no authority, and plaintiffs have cited none, stating that federal disciplinary standards preempt states from disciplining attorneys for improper acts performed in federal courts.

But, it was not determined if the enforcement of the state ethical standards involved herein would unduly interfere with the Congressional civil rights statutory scheme, as required by this Court in Gade v. National Solid Wastes Management Ass'n, __U.S.__, 112 S.Ct. 2374,2383 (1992), and cases therein.

Consequently, the present position of the Sixth Circuit is in direct conflict with that of the Third Circuit in Baylson v. Disciplinary Counsel of the Supreme Court of Pennsylvania, 975 F.2d 102,111 (CA3,1992), wherein it was held that state ethical rules that conflict with, or are incompatible with, federal law, are preempted.

2. A STATE CANNOT IMPOSE DISCIPLINARY SANCTIONS AGAINST ITS LICENSED LAWYERS FOR FEDERAL COURT CONDUCT WHICH IS AUTHORIZED, OR

HAS NOT BEEN PROHIBITED, BY THE FEDERAL COURT SYSTEM.

Inasmuch as there was no precedent from this Court that our requested fee was contrary to federal law principles, we were not on notice that such requested fee could possibly be considered to be unethical. As such, both the state and federal disciplinary sanctions imposed against us were in violation of federal constitutional Due Process. In Re Ruffalo, supra, 554, (White, J., concurring); Securities Industry v. Clarke, 898 F.2d 318, 321-22 (CA7,1990), and Boettcher v. Hartford Insurance Co., 927 F.2d 23,26 (CA1,1991).

The State of Ohio relied on Venegas v. Mitchell, 495 U.S. 82 (1990), as their basis for our claimed misconduct. But Venegas was decided after our requested fee, involved different facts, and held that the enforcement of a contingent fee contract had to be consistent with the purposes of §1988, and was, therefore, inapplicable to our conduct.

We undertook the representation of this client on this Court's guarantee that we would get a reasonable fee from a federal court if we were successful -- not because our client had a good chance for a large monetary recovery upon trial. Pennsylvania v. Delaware Valley Citizens Council for Clean Air, 483 U.S., at 726.

The end result, however, was that the state of Ohio cancelled out that guarantee when it intruded into the federal domain and interposed its own after-the-fact new rules. Rules that we were unaware of when we took the case or requested what we considered to be a reasonable fee under federal law.

3. STATE REGULATION OF THE FEES AN ATTORNEY MAY ASK OF HIS CLIENT IN THE SETTLEMENT OF A POST-TRIAL FEDERAL FEE-SHIFTING PROCEEDING WOULD SIGNIFICANTLY INTERFERE WITH THE ACCOMPLISHMENT OF THE PURPOSES AND OBJECTIVES OF THE INVOLVED FEDERAL ACT BY DETERRING COMPETENT COUNSEL FROM HANDLING SUCH CASES.

As noted previously, the Ohio Supreme Court refused to address our federal preemption claims, although repeatedly asked by us.

In its Opinion, the district court held that we did not show any Congressional intent in §1988 to preempt state attorney ethical standards, A23; that the federal Civil Rights Act was not primarily concerned with attorney fees, but with the vindication of a client's federal constitutional rights, A24, and that the State was investigating a fee agreement, not a potential attorney fee award. A24.

However, this Court has held that federal preemption is compelled, whether it is explicitly stated in the language of a federal statute, or is implicitly contained in the structure and purpose thereof. Fidelity Federal Savings & Loan Ass'n v. De la Cuesta, 458 U.S. 141,153 (1982) and Jones v. Rath Packing Co., 430 U.S. 519,525 (1977).

If a statute does not explicitly state an intent to preempt state law, a federal court

is to be guided by the goals and policies of the federal statute in order to determine its preemptive intent. International Paper Co. v. Ouellette, 479 U.S. 481,493 (1978). As argued previously, the overriding statutory concern of §1988 was to attract sufficiently competent attorneys to handle federal civil rights actions. Kay v. Ehrler, supra, 1437.

Federal preemption is implicit if an Act of Congress touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject, or if the goals "[s]ought to be obtained.." and the "[o]bligations imposed" reveal a purpose to preclude state authority. Wisconsin Public Intervenor v. Mortier, __U.S.__,__, 111 S.Ct. 2476,2481-82 (1991). As noted above, all of our work was done in furtherance of a federal statutory scheme of the highest Congressional priority, supra, page 22.

As mentioned at pp. 5-6, supra, our client

owed us $40,000 prior to our entering into a 50%-50% contingent fee trial contract, but the State felt that the contingent fee contract was the only controlling criteria as to what our fee should have been. In In Re San Juan Dupont Plaza Hotel Fire Litigation, 768 F. Supp. 912,921-22 (D,PR,1991), rev'd on other grnds 982 F.2d 603 (CA1,1992), (a non federal civil rights federal court proceeding involving the distribution between a class and an attorney of a settlement fund), the Court held that it was not limited to the face amount of a contingent fee contract, and that it was not inappropriate to compare a potential hourly award. It was further held that a high hee is appropriate where the risk of non-payment rested with the attorney, and that the Court was required to consider whether the fee allowed is sufficient to encourage competent counsel to undertake such comparable litigation in the future.

The same logic applies to all federal fee-

shifting litigation wherein the motivating inducement for an attorney to undertake such work is the guarantee of a reasonable statutory fee if success is attained.

Gade, supra, 2388, held that state standards which interfere with, or are contrary to, federal law are preempted. Further, that the ultimate task of a federal court is to determine if state regulation is consistent with the structure and purpose of the federal Act. 2383. Also, that a federal court must look to the effect of a state law on a federal statutory scheme. 2387. (Emphasis).

The State's position that it was only investigating a settlement fund division arising from federal litigation, rather than an award of attorney fees by a federal court, has no bearing on the federal preemption issue, since its activity (irrespective of the label placed thereon) had an impermissible effect on a federal statutory scheme. Although the Gade inquiry requirements were

requested of the Sixth Circuit, a discussion of Gade is not to be found in its Opinion.

In our case, there was a separate contract for appellate work plus a contingent contract for trial work. Somehow, they became homogenized by the State, but it is to be noted that in Venegas, supra, 90, this Court specifically left unresolved the amount of federal court supervision to be exercised in the enforcement of contingent fee contracts in federal civil rights proceedings.

4. THE PRINCIPLES OF YOUNGER ABSTENTION ARE NOT APPLICABLE WHEN A STATE IMPERMISSIBLY INTRUDES INTO AN EXCLUSIVELY FEDERAL DOMAIN.

The issue as to whether facially conclusive claims of federal preemption are not susceptible to federal court abstention, under Younger v. Harris, 401 U.S. 37 (1971), was not decided by this Court in New Orleans Public Service, Inc. v. Council of the City of New Orleans, 491 U.S. 350,367 (1989); where the State, unlike the present case, did

not seek to intrude into the federal domain.

The jurisdictional issue involved in New Orleans turned upon whether the activity in question was characterized as intrastate vs. interstate. Such determinations are often highly factual specific, and depend upon the expertise of state administrative agencies charged with the economic regulation of a particular industry. Congress and the state legislature have delegated frontline authority to such state agencies to find the facts, and to adopt economic regulations due to their specialized knowledge of the industries to be regulated. See CSXT, Inc. v. Pitz, 883 F.2d 468,471-74 (CA6,1989), cert den'd 494 U.S. 1030 (1990).

But, in contrast, Congress has not delegated authority to the states to determine reasonable fees for successful attorneys in a federal fee-shifting action, nor do the states possess specialized expertise in that area of the law.

In Re Apex Oil Co., 980 F.2d 1150,1152 n.7 (CA8,1992) and In Re Pan American Airlines Corp., 950 F.2d 839,847 (CA2,1991), held that federal court abstention concerns are not implicated when federal questions are presented, as Supremacy Clause questions are "essentially ones of federal policy," quoting from Hagans v. Lavine, 415 U.S. 528,550 (1974).

Nor did the cases relied upon below to support Middlesex abstention, A10, n.5, involve federal proceedings or a federal fee-shifting statute. (Younger abstention being the basis for Middlesex abstention).

5. THE ABSTENTION PRINCIPLES SET DOWN IN YOUNGER AND MIDDLESEX ARE NOT FURTHERED WHEN THE INVOLVED AND UNDERLYING SUBSTANTIVE LAW PRINCIPLES ARE EXCLUSIVELY FEDERAL.

Abstention under Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 424 (1982) requires that the underlying state attorney disciplinary proceeding be within

the appellate jurisdiction of the state's highest court. Ohio Civil Rights Comm. v. Dayton Christian Schools, 477 U.S. 619,627 (1986). Because the Ohio Supreme Court never had any jurisdiction to regulate its licensed attorney's conduct in a federal fee-shifting proceeding, it never had jurisdiction at all.

Middlesex involved an attorney making derogatory remarks about a state judge in a state proceeding. Query. If that same lawyer had made derogatory remarks about a federal judge in a federal proceeding, would the outcome have been the same? Once again look to the holding in the 1868 case of In Re Bradley.

Historically, without exception, all of the decisions of this Court that required Younger abstention dealt with the enforcement of state created standards, not federally created standards. Younger v. Harris (state criminal trial); Huffman v.Pursue Limited, 420 U.S. 592 (1975) (obscenity under state nuisance law); Trainor v. Hernandez, 431 U.S.

434 (1977) (state welfare fraud); Moore v. Sims, 442 U.S. 415 (1979) (state child abuse), and Ohio Civil Rights Comm v. Dayton Christian Schools, supra, (state standards of sexual discrimination) OR this Court's decisions dealt with state court proceedings concerning the enforcement of state court orders: Juidice v. Vail, 430 U.S. 327 (1977) (state court contempt proceedings); Trainor v. Hernandez, supra, (state attachment statutes), and Pennzoil Co. v. Texaco, Inc., 481 U.S. 1,13 (1987) (state appeal bond requirements).

The Younger abstention doctrine was based upon concerns of comity and federalism. 401 U.S., at 44. But state court comity is not applicable when important federal interests are involved. United States v. Gillock, 445 U.S. 360,373 (1980).

Moreover, the interests of federalism are not well-served by a rule that essential national policies are displaced by state regulations intended to achieve more limited

ends. F.T.C. v. Ticor Insurance Co., ___U.S. ___,___, 112 S.Ct. 2169,2178 (1992).

As the law now stands in the Sixth Circuit, the states now have the right to establish the federal policy regarding the reasonableness of a settlement fund division between a successful lawyer and his client in a federal fee-shifting proceeding.

6. AN APPLICANT'S REQUEST FOR DECLARATORY AND INJUNCTIVE RELIEF FROM A FEDERAL COURT, AGAINST STATE COURT ACTION, IS NOT MOOTED WHEN THE STATE COURT HAS ACTED WITHOUT JURISDICTION; HAS FAILED TO ADDRESS PROPERLY PRESENTED FEDERAL ISSUES, AND THE INJURY TO THE APPLICANT PERSISTS.

Robinson v. Ariyoshi, 753 F.2d 1468 (CA9, 1985) held that preclusive effect cannot be given to a prior state court judgment if the affected party did not have a full and fair opportunity to litigate his federal claims in the state court, or where the state court demonstrated an inability or unwillingness to

protect federal rights, citing Haring v. Prosise, 462 U.S. 306 (1983).

Page 12, supra, describes our frustration and that of E.J. Leizerman in this regard. Middlesex, supra, 431, upheld Younger abstention based upon the principle that there is no presumption that the state courts will not safeguard federal rights. 457 U.S., at 431. However, this Court has never decided whether Younger abstention principles are applicable when the state court proceedings have been completed and presented federal rights have not been protected by the state courts. New Orleans, supra, 369 n.4.

As was said in United States Catholic Conference v. Abortion Rights Mobilization, Inc. 487 U.S. 72,77 (1988):

> The challenge in this case goes to the subject matter jurisdiction of the court and hence its power to issue the order. The distinction between subject-matter jurisdiction and waivable defenses is not a mere nicety of legal metaphysics. It rests instead on the central principle of a free society that courts have finite bounds of authority, some of constitu-

> tutional origin, which exist to protect citizens from the very wrong asserted here, the excessive use of judicial power. The courts, no less than the political branches of the government, must respect the limits of their authority.

Since the Ohio Supreme Court had no jurisdiction to issue its disciplinary Order, such Order cannot be given preclusive effect so as to moot our federal court requests for declaratory and injunctive relief.

This Court recently held in Church of Scientology of California v. United States, ___U.S.___,___, 113 S.Ct. 447,449 (1992), that a federal court appeal is mooted by events which occur while the case is pending that make it impossible for the appellate court to grant "[any] effective relief whatever" to the appealing party, quoting Mills v. Green, 159 U.S. 651,653 (1895).

Let it be clearly understood that that is hardly the situation in our case, and that all our efforts in the federal courts, and this Court, have been appeals for effective relief.

7. WHEN FIRST STATE, AND THEN FEDERAL COURTS FAIL TO ADDRESS PROPERLY PRESENTED FEDERAL ISSUES BY AN APPLICANT, THEN THAT APPLICANT IS DENIED THE PROTECTION OF THE FIRST AND FIFTH AMENDMENTS.

Woods v. Orange County, 715 F.2d 1543,1547 (CA11,1983), held that depriving a federal court of jurisdiction to decide federal claims, where the affected party did not have a full and fair opportunity to have his claims litigated in a prior state court proceeding; would, in effect, deprive that party of any forum, state or federal, for the resolution of those claims. Further, that such effect would pose federal constitutional Due Process problems, citing Testa v. Katt, 330 U.S. 386 (1947) and General Oil Co. v. Crain, 209 U.S. 211 (1908).

Moreover, the right of access to the courts is part of the First Amendment right to petition the government for a redress of grievances. California Motor Transport Co. v.

Trucking Unlimited, 404 U.S. 508,510 (1971) and Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731,741 (1983).

When the Sixth Circuit failed to initially address, or on our Request For Rehearing, the omitted federal Issues set forth on page 15, supra, then there was a violation of our federal constitutional Due Process and First Amendment rights to have any forum, state or federal, determine our federal claims.

8. IF PRIVATE ATTORNEYS, WHO ARE URGED BY CONGRESS TO PERFORM THE DUTIES OF SALARIED GOVERNMENT ATTORNEYS, ARE NOT PROVIDED WITH ABSOLUTE FEDERAL OFFICIAL IMMUNITY FROM STATE REGULATION WHEN PERFORMING THOSE DUTIES, THEN SAID STATE REGULATION IS CALCULATED TO DIMINISH THE AVAILABILITY OF COMPETENT PRIVATE ATTORNEYS.

As mentioned, the issue of federal official immunity has yet to be addressed by the state or federal court systems.

The concept was simple. Instead of provi-

ding additional federal funds for the enforcement of federal civil rights claims by salaried federal government attorneys, Congress chose instead to cloak federal civil rights plaintiffs "in a mantle of public interest," by encouraging the enforcement of federal civil rights laws by inducing private lawyers away from their state law practices by the promise of a reasonable fee if they were successful in fullfilling a governmental responsibility. Hensley v. Eckerhart, supra, 443 n.2 (Brennan, J., concurring in part and dissenting in part).

Ulike the facts in Ferri v. Ackerman, 444 U.S. 193,203-05 (1980) -- which held that federal public defenders were not entitled to federal "official immunity" from state court malpratice suits -- we were not in an adversarial relationship with the United States government in the performance of a designated function. Rather, we were doing the work that would normally have been performed by sal-

aried federal government attorneys.

In Ferri v. Ackerman, at pages 204-205, it was held that the most persuasive reason for granting federal official immunity would be if, by granting such immunity, there would be a reduction in monetary compensation for the handling of criminal cases for indigent defendants, or the burden of defending groundless state attorney malpractice and/or attorney disciplinary proceedings, would reduce the supply of lawyers willing to handle such cases. Note also that public defenders are salaried.

In direct contrast, the state regulation of a requested attorney's fee in the successful litigation of a federal fee-shifting statute will reduce the supply of attorneys willing to handle such cases, in direct contravention of the purposes of federal fee-shifting statutes.

As said before, spending 3,000 hours to justify your federal fee is quite pointless.

9. THE INVOLVED FEDERAL TRIAL JUDGE IS IN THE BEST POSITION TO DETERMINE THE REASONABLENESS OF A REQUESTED FEE, AND A COMPLAINING PARTY IS REQUIRED TO FILE HIS OBJECTIONS WITH SAID JUDGE, AND OBTAIN HIS RULING, AS A CONDITION PRECEDENT TO ANY SUBSEQUENT COMPLAINT TO STATE DISCIPLINARY AUTHORITIES.

Our case did not involve a class action or a fund in the possession of the court, so there was no need for our trial judge to make a determination as to attorney fees without there being a timely objection filed by the party opposing a requested fee. United States v. Vague, 697 F.2d 805,808 (CA7,1983).

A party who opposes a requested attorney's fee has a responsibility to state his opbjections thereto in the federal district court with particularity and clarity. Pfeifer v. Sentry Insurance, 745 F. Supp. 1435,1443 (ED, Wisc,1991), citing Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 776 F.2d 646,664 (CA7, 1985).

Further, an attorney fee dispute between a federal court attorney and his client is collateral to the merits of the claims for relief, Sprague v. Ticonic National Bank, 307 U.S. 161,170 (1939), so that a federal district court has continuing jurisdiction over such dispute even after the completion of the proceedings on the merits. Willy v. Coastal Corp., __U.S.__,__, 112 S.Ct. 1076, 1080 (1992).

Also, such a requirement would be consistent with federal res judicata principles. FDIC v. Moitie, 452 U.S. 394,398 (1981), which held that res judicata is applicable to any issue that was decided, or could have been decided, by a prior judgment.

10. THE COMMON LAW BASIS FOR JUDICIAL OR QUASI-JUDICIAL IMMUNITY IS NOT FURTHERED BY PROVIDING ABSOLUTE IMMUNITY TO PRIVATE CITIZENS, WHOSE COMPLAINED OF ACTIONS ARE NOT INTIMATELY ASSOCIATED WITH THE JUDICIAL PHASE OF A STATE PROCEEDING.

The lower Court held that the Bar defendants were entitled to quasi-judicial immunity merely because they acted as "[arms] of the Supreme Court of Ohio ..." in the state disciplinary proceedings. A6.

However, whether an individual is entitled to such immunity is to be determined on a functional basis; i.e., whether he is performing in an adjudicative capacity. Forester v. White, 484 U.S. 219,224 (1988).

The Bar defendants herein were not acting in a judicial capacity in the state disciplinary proceedings; but rather, were acting in a prosecutional capacity.

Admittedly, absolute judicial immunity is applicable to activities that are intimately associated with the judicial phase of a proceeding; that is, the initiation of formal charges and the presentation of the state's case. Imbler v. Pachtman, 424 U.S. 409,431 (1976) and Burns v. Reed, __U.S.__,__, 111 S.Ct. 1934,1943-44 (1991). The necessary

inquiry herein, therefore, was whether the complained of activities of the Bar were investigative or prosecutional.

But, a court is required to make a factual determination as to whether the complained of activities were investigative or prosecutional, and whether the complained of conduct was sufficiently associated with the judicial phase of the proceedings as to be entitled to absolute immunity. Houston v. Partee, 978 F.2d 362,366 (CA7,1992), citing the prior decision of the Sixth Circuit in Joseph v. Patterson, 795 F.2d 549,555 (CA6,1985).

A reading of both Opinions of the Sixth Circuit and the federal district court will disclose that no such factual determination was made by either Court.

Of interest, this Question is similar to Question I involved in Buckley v. Fitzsimmons 952 F.2d 965 (CA7,1992), cert. gr'd __U.S.__, 113 S.Ct. 53 (1992), argued Feb. 22, 1993.

11. THE BASIS FOR STATE ACTION IMMUNITY -- FEDERALISM AND STATE SOVEREIGNTY -- ARE NOT FURTHERED BY GRANTING IMMUNITY TO AN ASSOCIATION OF PRIVATE CITIZENS WHEN THERE IS AN IMPERMISSIBLE RISK THAT THOSE CITIZENS WILL FURTHER THEIR OWN INTERESTS RATHER THAN THE GOVERNMENT'S.

The doctrine of state action immunity to federal anti-trust claims is based upon the principles of federalism and state sovereignty. Columbia, South Carolina v. Omni Outdoor Advertising, Inc., __U.S.__,__, 111 S.Ct. 1344,1349 (1990). In that regard, it has already been shown that federalism would not be furthered by granting state action immunity to the Bar defendants.

Nor were the actions of the Bar required by the State acting as a sovereign, Goldfarb v. Virginia State Bar Ass'n, 421 U.S. 773,790 (1975), as a State has no sovereign authority to investigage and determine what constitutes a reasonable attorney's fee in a federal

court fee-shifting proceeding. As such, the actions of the Bar defendants cannot be considered as valid government action. Cf. Allied Tube and Conduit Corp. v. Indian Head, Inc., 486 U.S. 492,499 (1988).

In Young v. United States, ex rel. Vuilton et Fils S.A., 481 U.S. 787,805 (1987), it was held that an impermissible conflict of interest was created by the use of attorneys, who had a personal interest in a particular matter, to act as a prosecutor in a federal court criminal contempt proceeding.

That same conflcit exists when a private club of lawyers, who are in competition with unpopular non-club lawyers in the same geographic area, are permitted to act as prosecutors in a state disciplinary action. It is uncommon for a state bar association to bring disciplinary actions against unpopular and/or unorthodox lawyers. Zauderer v. Disciplinary Counsel of the Ohio Supreme Court, 471 U.S. 626,666-67 n.10 (1985). (Brennan, J., con-

curring in part and dissenting in part).

12. THIS COURT, PURSUANT TO ITS RULE 10.1(a) and (c), SHOULD EXERCISE ITS SUPERVISORY POWERS TO COMPEL THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT TO ADJUDICATE ALL UNADDRESSED ISSUES IN ACCORDANCE WITH THIS COURT'S STANDARDS.

Rule 10.1 (a) and (c) provide as follows:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

In Young v. United States, ex rel. Vuilton et Fils S.A., supra, the basis for this Court's decision was the use of its supervisory powers over the lower federal courts.

This Court has held that, in the exercise of such supervisory powers, it can modify, or reverse, judgments of lower federal courts in accordance with principles derived neither from the United States Constitution nor from any Act of Congress. United States v. Hastings, 461 U.S. 499,505 (1983).

This Court may require a lower federal court, through its supervisory powers, to follow procedures deemed desirable from the viewpoint of sound judicial administration. Cupp v. Naughton, 414 U.S. 141,146 (1973).

In the present case, the U.S. Court of Appeals for the Sixth Circuit failed to follow prior decisions of this Court; other U.S. Circuit Court of Appeals; its own prior decisions, and failed to consider the applicable preemption standards set down by this Court in Gade v. National Solid Wastes Management Ass'n, supra. Nor did it consider all of the Issues presented to it.

Those deficiencies and omissions were set

forth in our Petition For Rehearing En Banc, which was overruled on March 12, 1993.

13. IN ORDER TO ASSURE THAT AN APPEAL AS OF RIGHT TO A U.S. CIRCUIT COURT OF APPEALS IS EFFECTIVE, SO AS TO SATISFY THE FIRST AMENDMENT'S ACCESS TO THE COURTS REQUIREMENT AND THE FIFTH AMENDMENT'S DUE PROCESS REQUIREMENTS, A UNITED STATES COURT OF APPEALS IS OBLIGED TO ADDRESS EACH PROPERLY PRESENTED ISSUE AND TO FOLLOW THIS COURT'S STANDARDS.

The First Amendment aspect of this argument was oreviously discussed at pages 39-40.

The federal Due Process Clause requires a meaningful opportunity to have claims heard and decided by a court. Boddie v. Connecticut 401 U.S. 371,378 (1971).

Inasmuch as Congress created a system for appeals as of right to United States Circuit Courts of Appeals, federal constitutional Due Process is denied when governmental action constitutes the deprivation of an established adjudicatory procedure. Logan v. Zimmerman

Brush Co., 455 U.S. 422,433 (1982).

Federal constitutional Due Process requires the opportunity for an individual to present his case and to have the merits thereof fairly adjudicated. Ambus v. Granite Board of Education, 975 F.2d 1555,1568 (CA10, 1992).

When Issues are unaddressed and this Court's standards are not followed in a federal appellate proceeding, then there has been a denial of a meaningful opportunity to have federal claims heard and decided in a proper manner.

For all these reasons, the application of state professional codes that immobilize and discourage federal court practitioners from undertaking federal fee-shifting litigation, as Ohio has done here, presents important federal statutory and constitutional questions that should be resolved by this Court.

CONCLUSION

The Court should issue a writ of certiorari to review the federal statutory and constitutional challenges to the United States Circuit Court of Appeals for the Sixth Circuit's decision, wherein it condoned and approved of the actions of the Ohio Supreme Court herein, and encourages further federal court interference by the state of Ohio, by its clear message that it will not intervene to stop such state activity.

Respectfully submitted,

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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

No. 91-4178

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SANFORD J. BERGER;
ROBERT M. FERTEL,
Plaintiffs-Appellants,

v.

CUYAHOGA COUNTY BAR ASSOCIATION, et al.,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Northern District of Ohio

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Decided and Filed January 11, 1993

Before: BOGGS and SUHRHEINRICH, Circuit Judges; and WELLFORD, Senior Circuit Judge.

SUHRHEINRICH, Circuit Judge. Plaintiffs Sanford J. Berger and Robert M. Fertel appeal the dismissal of their complaint seeking injunctive, declaratory, and monetary relief for claims arising out of state bar disciplinary proceedings brought against them. The district court dismissed the complaint on the basis of *Younger* abstention and the state action immunity. We hold that plaintiffs' claims are barred by judicial immunity, state action immunity, *Younger* abstention, and mootness. We AFFIRM.

I. FACTS

Plaintiffs are attorneys licensed to practice law in Ohio. They represented Daniel Gurish in a federal civil rights action in which the jury awarded Gurish $100,000 in damages. Plaintiffs filed a motion to recover their fees under 42 U.S.C. § 1988.[1] This prompted a settlement offer of $130,000, inclusive of attorney fees. Against plaintiffs' advice, Gurish accepted the settlement offer.

Plaintiffs and Gurish disagreed as to the proper division of the settlement amount. Plaintiffs maintained that they were entitled to 50% of the original jury award of $100,000 *plus* the additional $30,000 award in the settlement, for a total of $80,000. Gurish contended that he was to receive $100,000, the full amount of his jury award. As a result of the dispute, Gurish obtained new counsel and brought suit against plaintiffs. Gurish ultimately settled with plaintiffs for $65,000, half of the settlement amount.

Although the matter was resolved, Gurish filed a complaint with the Cuyahoga County Bar Association regarding plaintiffs' conduct. An investigation by the Certified Grievance Committee of the Ohio Bar Association followed.[2] The Grievance Committee scheduled an Investigative Hearing for November 20, 1989. At the hearing, the Grievance Committee found probable cause to file a formal complaint against plaintiff

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[1]Section 1988(b) provides, in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title . . . , the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

[2]This committee is certified by the Board of Commissioners on Grievances and Discipline of the Supreme Court (Board of Commissioners) and is authorized to investigate complaints alleging attorney or judicial misconduct. *See* Supreme Court Rule for the Government of the Bar V, § 6(c) [hereinafter Supreme Court Rule].

Berger. The matter was referred to a probable cause panel.[3]

The Grievance Committee also filed an initial complaint against plaintiff Fertel based on testimony presented at the hearing. Another Investigatory Hearing was held on February 8, 1990, at which probable cause was found to support a formal complaint against plaintiff Fertel. This matter was also referred to a probable cause panel. Both complaints against plaintiffs were certified on October 18, 1990, and a formal hearing was held on April 19, 1991.

On January 23, 1990, in the midst of the investigation, plaintiff Berger filed a complaint in federal district court seeking a declaratory judgment, injunctive relief, money damages, and costs. On February 28, 1990, plaintiff Berger amended the complaint to add Fertel as a plaintiff. Plaintiffs alleged various constitutional and antitrust violations on the part of the Ohio Supreme Court, the Cuyahoga County Bar Association, its committees, and its members.

On September 19, 1991, the district court dismissed the complaint based on *Younger* abstention and state action immunity from the antitrust claims. Plaintiffs filed a motion to alter or amend judgment which the district court denied. This timely appeal followed.

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[3]The Grievance Committee's finding of probable cause is preliminary. The matter must be reviewed by a probable cause panel composed of three members of the Board of Commissioners. The panel reviews the matter to decide whether probable cause exists to charge an attorney with misconduct. If so, the formal complaint and a summary of the Grievance Committee's findings are sent to the Secretary of the Board of Commissioners who may certify the formal complaint and forward it to the Board of Commissioners if the Secretary finds that probable cause exists. Supreme Court Rule V, §§ 10-11. Once certified, the respondent must file an answer to the complaint. Supreme Court Rule V, § 12(a). Once the answer is received, a hearing panel of three commissioners is appointed and a formal adjudicatory hearing is held. Supreme Court Rule V, § 13. If disciplinary action is recommended by the panel, the matter is referred to the Supreme Court of Ohio for final decision. Supreme Court Rule V, § 18.

On September 2, 1992, during the pendency of this appeal, the Supreme Court of Ohio issued a decision finding that plaintiffs had charged an excessive fee, had withheld settlement proceeds from their client, and had interfered with the bar association investigation. Because of these infractions, the court suspended plaintiffs from the practice of law for one year. *Cuyahoga County Bar Ass'n v. Berger*, 64 Ohio St. 3d 454 (1992) (per curiam).

II. STANDARDS OF REVIEW

We review decisions to abstain de novo. *Federal Express Corp. v. Tennessee Pub. Serv. Comm'n*, 925 F.2d 962, 967 (6th Cir.), *cert. denied*, 112 S. Ct. 59 (1991); *Litteral v. Bach*, 869 F.2d 297, 298 (6th Cir. 1989); *Traughber v. Beauchane*, 760 F.2d 673, 676 (6th Cir. 1985). Further, the application of judicial immunity and state action immunity are questions of law which we also review de novo. *Crooks v. Maynard*, 913 F.2d 699, 700 (9th Cir. 1990) (judicial immunity); *Grayson Elec. Co. v. Sacramento Mun. Util. Dist.*, 770 F.2d 833, 835 (9th Cir. 1985), *cert. denied*, 474 U.S. 1103 (1986) (state action immunity).

Questions of jurisdiction are fundamental matters which we may review sua sponte. *Carras v. Williams*, 807 F.2d 1286, 1289 n.5 (6th Cir. 1986). Thus, we address the problem of mootness on our own motion.

III. ANALYSIS

On appeal, plaintiffs contend that the Ohio disciplinary action is an improper exercise of state jurisdiction, which is by federal law preempted as well as being unconstitutional. Plaintiffs also raise antitrust claims. Plaintiffs seek money damages for the alleged constitutional and antitrust violations, an injunction against the state proceedings, and a declaratory judgment that the proceedings are unconstitutional. Defendants counter that these claims are not properly before this court because of

immunity and *Younger* abstention. We address plaintiffs' claims seeking money damages first.

A. MONEY DAMAGES

1. Judicial Immunity

Plaintiffs seek money damages for constitutional and antitrust violations. Defendants maintain that, under doctrines of immunity, these claims are barred.

Traditionally, judges have enjoyed broad immunity from suit for judicial acts. *Forrester v. White*, 484 U.S. 219, 225 (1988). Judicial immunity, however, does not preclude suit for prospective relief such as an injunction. *Pulliam v. Allen*, 466 U.S. 522, 541-42 (1984). Further, the existence of judicial immunity depends on whether the offending actions were taken to carry out a judicial function. *Forrester*, 484 U.S. at 227. *See Sparks v. Character and Fitness Comm.*, 859 F.2d 428, 432-34 (6th Cir. 1988), *cert. denied*, 489 U.S. 1011 (1989).

However, judges may be entitled to different types of immunity if non-judicial functions are involved. For example, the Supreme Court has held that judges who promulgate a code of conduct for attorneys act in a legislative capacity and are entitled to legislative immunity from suits based on such actions, rather than judicial immunity. *Forrester*, 484 U.S. at 228. On the other hand, a judge who enforces a code of conduct is entitled to prosecutorial immunity. *Supreme Court of Virginia v. Consumers Union of the United States*, 446 U.S. 719, 736-37 (1980). *See Forrester*, 484 U.S. at 228-29. Because prosecutors are absolutely immune from suit for money damages, judges acting as enforcers are also absolutely immune from suit for money damages. *Consumers Union*, 446 U.S. at 736; *Imbler v. Pachtman*, 424 U.S. 409, 421-29 (1976).

In the present appeal, defendants' role was that of an enforcer. Thus, under *Forrester* and *Consumers Union*,

the Supreme Court of Ohio and its justices are immune from suit for money damages. The Cuyahoga County Bar Association, its committees and members are likewise immune from suit because they acted as arms of the Supreme Court of Ohio in performing a function for which the court and its justices are immune. *Sparks*, 859 F.2d at 433 ("[I]t is of no moment that the actor is a designee of the justices of [the Supreme Court of Ohio] rather than the justices themselves."). *See also Watts v. Burkhart*, 61 U.S.L.W. 2274 (6th Cir. Oct. 28, 1992) (en banc) (discussing prosecutorial and judicial immunity).

2. State Action Immunity

Plaintiffs also allege that the disciplinary rules and proceedings are unreasonable restraints on trade which violate the Sherman Act, 15 U.S.C. §§ 1 through 7. Defendants raise state action immunity in defense to this claim.

The Supreme Court has stated that state action immunity precludes application of the Sherman Act to state programs. *Parker v. Brown*, 317 U.S. 341, 352 (1943). This is because the Sherman Act was not intended to limit state programs which "derive [their] authority and . . . efficacy from the legislative command of [a sovereign] state." *Id.* at 350.

The Court has applied this doctrine to the promulgation and enforcement of codes of ethical conduct for attorneys. In *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the Court held that disciplinary rules promulgated by a state supreme court pursuant to a constitutional grant of authority over the practice of law are directives of the sovereign which qualify for state action immunity. *Id.* at 359-63.

In the present case, plaintiffs violated Ohio disciplinary rules regarding fees, settlement proceeds, and disciplinary investigations. These rules were promulgated by the Supreme Court of Ohio pursuant to its constitutional grant

of power to regulate the practice of law. *See* Ohio Const. art. IV, § 2(B)(1)(g). Promulgation and enforcement of the rules are plainly exercises of Ohio's sovereign power. Under *Bates*, state action immunity exists and plaintiffs' antitrust claims are barred.

B. INJUNCTIVE AND DECLARATORY RELIEF

1. *Younger* Abstention

Plaintiffs sought to enjoin the state disciplinary proceedings and to have the proceedings declared unconstitutional. Defendants respond that the district court properly abstained under *Younger*.

In *Younger v. Harris*, 401 U.S. 37 (1971), the Supreme Court held that a federal court should not enjoin a pending state criminal proceeding unless "the danger of irreparable loss is both great and immediate." *Id.* at 45 (quoting *Fenner v. Boykin*, 271 U.S. 240, 243 (1926)). The Supreme Court extended *Younger* "to noncriminal judicial proceedings when important state interests are involved." *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). *See Moore v. Sims*, 442 U.S. 415, 423 (1979); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604-05 (1975).

In *Middlesex*, a case similar to the present appeal, a lawyer challenged disciplinary proceedings of the New Jersey Bar Association by filing suit in federal court. He contended that the proceedings violated his First Amendment rights. *Middlesex*, 457 U.S. at 427-29. The Court held that the federal district court correctly dismissed the case based on *Younger*. As part of its analysis, the Court enunciated a three-part inquiry for the application of *Younger* abstention to state bar disciplinary hearings:

> [F]irst, do state bar disciplinary hearings within the constitutionally prescribed jurisdiction of the State Supreme Court constitute an ongoing state

> judicial proceeding; second, do the proceedings implicate important state interests; and third, is there an adequate opportunity in the state proceedings to raise constitutional challenges.

Id. at 432 (emphasis omitted). The similarities between the present appeal and *Middlesex* demand that we likewise abstain in this case.

As to the first question, the *Middlesex* Court found that the New Jersey State Constitution vested the power to govern and discipline the bar in the New Jersey Supreme Court and that the New Jersey proceedings were judicial in nature and the first prong of *Middlesex* was satisfied. *Id.* at 433-34. Similarly, Ohio's constitution vests original jurisdiction in its supreme court over "[a]dmission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law." Ohio Const. art. IV, § 2(B)(1)(g). Thus, the proceedings are within the "constitutionally-prescribed jurisdiction" of the Supreme Court of Ohio.

Further, like the New Jersey proceedings, the Ohio disciplinary proceedings are carried out by committees which are arms of the Ohio Supreme Court. A Grievance Committee reviews an initial complaint and investigates to decide if a prima facie case of improper conduct exists; if so, a formal hearing is held. The supreme court ultimately decides what discipline should be given. *Cf. id.* at 425-27. Thus, the Ohio procedures are judicial in nature and the first prong of *Middlesex* is satisfied.

Regarding the second prong of the *Middlesex* test, the Court found "an extremely important [state] interest in maintaining and assuring the professional conduct of the attorneys it licenses." *Id.* at 434. Indicative of that interest was the very fact that the New Jersey Bar Association, an agency of the state, was involved as a defendant in federal court and the initiator of state proceedings. *Id.* at 434-35. Here, the Ohio defendants were also involved in federal litigation to protect Ohio's

role in maintaining the integrity of its legal profession. As in New Jersey, regulation of the legal profession is of great importance to Ohio and the second prong is satisfied.

In evaluating the third prong of its analysis, the Court stated that "[s]o long as the constitutional claims of respondents can be determined in the state proceedings and so long as there is no showing of bad faith, harassment, or some other extraordinary circumstance that would make abstention inappropriate, the federal courts should abstain." *Id.* at 435. The Court found that the New Jersey proceedings provided the respondent with the opportunity to present his constitutional claims by answering the complaint against him and raising the issues to the committees and the Supreme Court of New Jersey. *Id.* at 435-36. Like the respondent in *Middlesex*, plaintiffs had the opportunity to present their constitutional claims in their answer to the complaint against them.[4]

Plaintiffs allege bad faith and harassment on the part of the Grievance Committee. First, they argue the proceedings harass civil rights attorneys, thereby impairing federal rights under 42 U.S.C. § 1983. However, plaintiffs have not alleged specific facts showing a concerted effort to discipline only civil rights attorneys. Second, they argue the proceedings were brought in bad faith because of past conflicts in litigation with members of the Grievance Committee. This argument is without merit. The very nature of our

[4]The Court also found that respondent had an adequate opportunity to present his arguments because the New Jersey Supreme Court had reviewed the constitutional issues sua sponte. The Supreme Court of Ohio did not engage in such a review, but that is not dispositive. Prior to considering New Jersey's sua sponte review, the Court stated that the proceedings themselves made "it . . . difficult to conclude that there was no 'adequate opportunity' for respondent . . . to raise his constitutional claims." *Id.* at 435-36. Thus, the New Jersey Supreme Court's review was merely an additional fact, not the linchpin of the decision. The Ohio proceedings allowed plaintiffs the same opportunity to present constitutional arguments as the respondent in *Middlesex* had.

adversarial legal system requires attorneys to oppose each other during litigation in order to represent zealously the interests of the client. Since the bar association is a self-governing body, it is inevitable that attorneys who have disagreed in prior matters will eventually be called on to discipline each other. Absent specific facts demonstrating bad faith by the Committee, we find that the third *Middlesex* factor requires abstention.[5]

Finally, plaintiffs argue that *Middlesex* is inapplicable because the conduct which violated the state disciplinary rule in *Middlesex* arose in a state court case based on state law whereas the present conduct arose in a federal court case based on federal law. This argument is also without merit. Federal courts have the inherent authority to discipline attorneys practicing before them and to set standards for their conduct. *See Stone v. Philadelphia and AFSCME Dist. Council 33, Local 159*, No. 86-1877, 1986 WL 13483, at *4 (D. Pa. Nov. 25, 1986); *International Business Machs. Corp. v. Levin*, 579 F.2d 271, 279 n.2 (3d Cir. 1978). Nevertheless, we know of no authority, and plaintiffs have cited none, stating that federal disciplinary standards preempt states from disciplining attorneys for improper acts performed in federal courts.[6] *Younger* abstention is appropriate in this instance.

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[5]Our decision is consistent with the findings of other courts which have refused to interfere with state bar proceedings. *See Hefner v. Alexander*, 779 F.2d 277, 279-80 (5th Cir. 1985); *Mason v. Departmental Disciplinary Comm.*, 894 F.2d 512, 514-16 (2d Cir.), *cert. denied*, 110 S. Ct. 3274 (1990); *Richardson v. The Florida Bar*, No. 90-C984, 1990 U.S. Dist. LEXIS 5864, at *10-11 (D.D.C. May 15, 1990); *Gipson v. New Jersey, Supreme Court*, 558 F.2d 701, 703-04 (3d Cir. 1977) (pre-*Middlesex* case).

[6]Even if preemption applies, it does not preclude abstention unless the state court is actually denied jurisdiction by federal statute. The reason is straightforward: state courts are as capable of adjudicating preemption claims as federal courts. *Federal Express Corp. v. Tennessee Public Serv. Comm'n*, 925 F.2d 962, 968 (6th Cir.), *cert. denied*, 112 S. Ct. 59 (1991); *CSXT, Inc. v. Pitz*, 883 F.2d 468, 471-74 (6th Cir. 1989), *cert. denied*, 494 U.S. 1030 (1990).

2. Mootness

Although not raised by the parties, we also find that issuance of the decision by the Ohio Supreme Court moots plaintiffs' claims for injunctive and declaratory relief against defendants. We are therefore without power to hear these claims. U.S. Const. art. III, § 2; *Carras v. Williams*, 807 F.2d 1286, 1289 (6th Cir. 1986). "Mootness results when events occur during the pendency of the litigation which render the court unable to grant the requested relief." *Carras*, 807 F.2d at 1289.[7] Nothing remains to be enjoined or declared improper.

For all the foregoing reasons, we AFFIRM.

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[7]In *Carras*, the Supreme Court had denied a writ of certiorari to appeal a state supreme court decision. *Carras*, 807 F.2d at 1288. Although the *Carras* court emphasized the denial of certiorari as mooting the corresponding federal suit seeking to enjoin the state court proceedings, we nevertheless find that the claims for injunctive and declaratory relief are also moot.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

(Filed on September 19, 1991)

SANFORD J. BERGER, et al.	()	1:90 CV 119
Plaintiffs	()	
- vs -	()	ORDER
THE CUYAHOGA COUNTY BAR ASS'N, et al.	()	
Defendants	()	

Battisti, J.

Before the Court are Plainiffs' motion for injunctive relief, Defendants' motions to dismiss, Plaintiffs' motions to add new parties, for an expeditious ruling, and to file additional pleadings. For the reasons set forth below, the Court grants Defendants' motions to dismiss. Plaintifs' miscellaneous motions are moot.

FACTS

This case arises out of a disciplinary proceeding brought by defendant Cuyahoga County Bar Association, involving Plaintiffs,

attorneys Sanford J. Berger and Robert M. Fertel. The disciplinary proceeding in turn resulted from a dispute over legal fees between Plaintiffs and their former client, Daniel Gurish.

Plaintiffs seek to have the Court enjoin the Bar Association from going forward with its disciplinary proceeding. Plaintiffs also seek to have the court enjoin numerous other defendants, among them: The Grievance Committee of the Cuyahoga County Bar ASsociation; Lawrence Turbow, an investigator for the Grievance Committee; J. Warren Bettis, Disciplinary Counsel for the Bar Association; the Board of Commissioners on Grievances and Discipline of the Bar ASsociation; and the Supreme Court of Ohio. (Mr. Gurish and his new counsel, Thomas L. Meros, were defendants at an earlier point in the litigation. Plaintiffs have moved to add more Bar Association officials and other individuals involved in the disciplinary proceedings, among them:

Marshall Wolf, Ellen S. Mandell, Frederick L. Oremus, Thomas G. Knoll, Charles E. Brown, Ohmer O. Crowell, and Howard R. Besser. As already mentioned, given the disposition of the case, Plaintiffs' motion is moot.)

From 1983 to 1989, Plaintiffs Berger and Fertel represented their client in a federal civil rights action. They were successful in two appeals before the Sixth Circuit.

On July 28, 1988, the matter went to trial before a jury, which five days later returned a verdict for the plaintiff of $100,000. The court then entered judgment in that amount, along with reasonable attorney fees and costs. Berger and Fertel subsequently filed a motion for their fees. During hearings on the issue of attorney fees, the parties began negotiations to bring the matter to a conlcusion.

On February 9, 1989, the defendants offered a settlement of $130,000, including attorney fees, which Berger and Fertel rejec-

ted. Their client, however, wished to settle the case. As was the client's right, he directed Berger and Fertel to accept the offer.

Berger and Fertel then asserted that they were entitled to receive fees of $80,000, while their client was to get the remainder of $50,000. The client was unsatisfied with this division and retained new counsel.

The client's new counsel attempted to gain a review of the fees before the trial court that had tried the underlying civil rights action. After his motion was dismissed for lack of jurisidiction, the settlement having been entered already, he filed suit in state court and also filed a complaint with the Bar Association. Berger and Fertel refused to submit this matter to arbitration, as requested by the Bar Association.

On November 20, 1989, the Bar Association Grievance Committee held an investigative hearing. An estimated fifty (50) lawyers were present, some of whom had been opposing

counsel in previous cases litigated by Berger and Fertel, or were involved in other disputes with them. The Grievance Committee voted to refer the investigation to a Trial Committee. Although Berger and Fertel and their client later settled their disagreement, the Bar Association investigation is still pending.

DISCUSSION

As a preliminary matter, this Court notes it does not reach the questions of whether Plaintiff Berger and Fertel's attorney fees were reasonable or pursuant to an agreement. For the purposes of a motion to dismiss, the complaint is construed in the light most favorable to the plaintiff and its allegations taken as true. Lee v. Western Reserve Psychiatric Habilitation Center, 747 F.2d 1062, 1065 (6th Cir. 1984).

In their motion for attorney fees, Plaintiffs requested $191,000. In the present complaint, they allege that their client had

agreed to not only a contingent fee arrangement, whereby they would receive half of any judgment for damages, but also fees for their appellate work plus any additional attorney fees which they would have received under federal civil rights statutes. Thus, the $80,000 apparently represents half of the jury verdict ($50,000) in addition to the difference between the settlement offer, which included attorney fees, and the verdict ($30,000).

Regardless, this Court must abstain from interfering with the ongoing Bar Association investigation. It is by now well-established that federal courts should not stay or enjoin pending state prosecutions. Younger v. Harris 401 U.S. 37 (1971). Instead, they should abstain because of important federalism concerns in respecting state institutions' ability "to perform their separate functions in their separate ways." Id. at 44.

Specifically, the Supreme Court has ex-

tended the doctrine of Younger abstention to insulate from federal review state bar association disciplinary proceedings. Middlesex Ethics Committee v. Garden State Bar Association, 457 U.S. 423 (1982). Indeeed, the Court set a high standard of deference to state courts. "where vital state interests are involved, a federal court should abstain 'unless state law clearly bars the interposition of the constitutional claims.'" Id., quoted in Watts v. Burkhart, 854 F.2d 839,845 (6th Cir. 1988).

In Middlesex, the plaintiff was an attorney who had made remarks about a judge's abilities and racial attitudes during a criminal trial. He challenged a New Jersey Bar Association ethics inquiry into his behavior. The Supreme Court determined that Younger-abstention was appropriate under three crieria.

First, "the notion of comity" between

federal and state courts applied to the proceedings because they were judicial in nature, having been established under the state constitution and state supreme court rules. Middlesex, 457 U.S. at 431-34.

Second, the proceedings implicated important state interests in assuring the ethical and professional conduct of the legal profession. The Court observed that "[s]tates traditionally have exercised extensive control over the professional conduct of attorneys." Id. at 434.

Third, the proceedings provided adequate opportunities for the accused to raise constitutional challenges. Id. at 435. The procedural posture was unusual though: it was onlyu after the attorneys began federal litigation that the state supreme court considered constitutional objections to the bar proceedings. Id. at 436.

The Middlesex decision is on point and dispositive. Like the New Jersey Bar Associ-

iation-disciplinary proceedings, the Ohio Bar Association disciplinary proceedings have been established under the state constitution and state supreme court rules. See Ohio Const. Art. IV, § 2(B)(1)(g), § 5(B); Ohio S.Ct. Rule V. The Ohio Constitution provides that, "[t]he supreme court...shall make rules governing the admission to the practice of law and discipline of persons so admitted." Ohio Const. Art.IV,§5(B). Under its authority, the Ohio Supreme Court has authorized bar associations like the present Defendant to initiate grievance proceedings. Ohio S.Ct. Rule V(6)(c).

The state of New Jersey and Ohio have identical interests in overseeing the professional conduct of members of their respective bars.

Moreover, Plaintiffs bear the burden of showing "that state procedural law bar[s] presentation of [their] claims." Federal Express v. Tennessee Public Service Comm.,

925 F.2d 962,970 (6th Cir. 1991) (internal quotes omitted). They have not cited state laws or regulations that preclude the constitutional challenges which they would like to present. Plaintiffs will be able to raise their arguments within the disciplinary proceedings, especially if they reach disposition before the Ohio Supreme Court. Ohio S. Ct. Rule V(20). Unlike the Middlesex situation, attorneys facing disciplinary actions in this state do not need to resort to federal litigation to ensure that they will have an opportunity to raise their constitutional claims.

Although the Sixth Circuit has not yet considered abstention under these exact circumstances, other circuits have held that abstention is appropriate in the context of a bar association disciplinary proceeding. The fact patterns in those cases and the present case are virtually indistinguishable. In each, plaintiffs were attorneys who were subject to

bar association disciplinary proceedings; they tried to have a federal district court enjoin the bar association. See, e.g., Mason v. Departmental Disciplinary Committee, 894 F.2d 512 (2nd Cir. 1990), cert. denied 58 U.S.L.W. 3835 (1990); Richardson v. Florida State Bar, 1990-2 Trade Cas. (CCH) P 69,111 (D.D.C. 1990). See also Heffner v. Alexander, 779 F.2d 277 (5th Cir. 1985); Director of Lawyers Professional Responsibility Board v. Perl, 752 F.2d 353 (8th Cir. 1985).

Plaintiffs have not alleged that the Ohio Supreme Court or the Bar Association have adopted rules dramatically different than the other state supreme courts and Bar Associations involved in previous cases of abstention.

Instead, their Hydra-like arguments repeat in many different ways the same basic proposition. They argue that the Bar Association lacks jurisdiction over their conduct because federal civil rights statutes contain

provisions on attorney fees, which they contend pre-empt state bar association regulations on the subject. Alternatively, they argue that their own status as "private attorneys general" protects their fee-arrangements from Bar Association review.

The Sixth Circuit has rejected similar pre-emption arguments against abstention. Simply put, it has stated that a potential pre-emption issue does not alter abstention analysis. Federal Express, 925 F.2d 962; CSXT, Inc. v. Pitz, 883 F.2d 468 (6th Cir. 1989), cert. denied 58 U.S.L.W. 3596 (1990). In both decisions, the pre-emption argument was stronger than it is here, as federal regulatory schemes were present.

Plaintiffs have raised interesting and important issues. But their arguments should be raised within the Bar Association proceedings or addressed to the Ohio Supreme Court. They have not pointed out any federal statute or regulation of attorney fees in civil right

actions that expressly or impliedly pre-empts state bar association standards. Furthermore, they have not shown any Congressional intention to preempt state actions in this area.

To the contrary, defendants persuasively argue that the federal civil rights statutes are not primarily concerned with attorney fees. Furthermore, to the extent that the statutes address attorney fees and "private attorneys general," they make it clear that the client and the vindication of his constitutional rights are the paramount concerns. See Evans v. Jeff D., 475 U.S. 717, 730-32 (1986) (discussing fees). A proper concern for attorney fees does not conflict with the policies embodied in federal civil rights statutes.

In the disciplinary proceedings at issue here, the Bar Association appears to be investigating the agreement between Plaintiffs and their client regarding fees, rather than any potential award of attorney fees under

civil rights statutes. And again, it is important to note that Plaintiffs have had and will continue to have opportunities to present their arguments within the course of Bar Association proceedings.

Plaintiffs also allege that the Younger exceptions are applicable. Their strongest argument for an exception is essentially that bad faith or bias has infected the bar association disciplinary proceedings. Taking the complaint as true, it does not allege facts sufficient to constitute bad faith or bias, as they are defined for abstention analysis.

The standard for evaluating claims of bad faith and bias is difficult to meet. As another court that abstained from interfering with a bar proceeding expalined, "Younger and its progeny make it obvious that the 'bad faith' exception is narrow and should be granted parsimoniously." Hefner, 779 F.2d at 280. For example, New York attorney C. Vernon Mason, whose representation of Tawana Brawley

in a much-publicized case led to a state bar investigation of his conduct, was unable to "set forth circumstances that warrant federal court intervention." Mason, 894 F. 2d at 515. His allegations, in a case with highly charged racial overtones, were far more serious than the ones raised here.

Here, Plaintiffs allege bad faith and bias because one of three investigators assigned to their case before the Bar Association also serves as opposing counsel in unrelated litigation brought by Plaintiffs. Additionally, they allege selective prosecution because another colleague, who had a fee dispute with a client, was not subject to Bar Association investigation.

Although the Bar Association might well avoid assigning investigators to cases where they have a possible conflict of interest, Plaintiffs' allegations fall short of the bad faith standard. The Bar ASsociation's failure to conduct itself in an ideal manner, while

regrettable, does not overcome the strong policies of Younger abstention.

Plaintiffs refer to correspondence with the Bar Association and meetings that occurred as part of the disciplinary proceedings as revealing a "vindictive, retaliatory attitude on the part of the Bar Ass[ociation]." Plaintiffs' Motions For Preliminary and Permanent Injunctions at 30-33. Plaintiffs' list of events actually reveals nothing but the activities ordinarily expected in a Bar Association proceeding. If the Bar Association had neglected to crrespond with Plaintiffs or refused to meet with them, that would have been more telling.

In contrast to this case, the rare instances of federal courts applying Younger exception have involved allegations of egregious bad faith and bias. The single case where a bar association investigation fell within the bad faith exception involved a series of bar actions over the course of

several years. Bishop v. State Bar of Texas, 736 F.2d 292 (5th Cir. 1984). Even there, the court dismissed the plaintiff's broad attacks on the bar procedures, allowing him to proceed only insofar as he could demonstrate a pattern of harrassment. Id. at 294. Despite his efforts at a full hearing, he was not able to demonstrate any such harrassment. Bishop v. State Bar of Texas, 791 F.2d 435 (5th Cir. 1986).

In an extraordinary case where a federal district court did enjoin a state criminal prosecution of an attorney, his allegations "painted a picture of pervasive racism and discriminatory treatment of blacks in the [] court system" as well as political motivations. Lewellen v. Raff, 843 F.2d 1103,1110 (8th Cir. 1988), cert. denied 489 U.S. 1033 (1989). The attorney also raised allegations of illegal surveillance tactics on the part of the defendants. Id. at 1114.

Finally, Plaintiffs raise antitrust

claims. They are correct in asserting that the Bar Association does not by virtue of its status enjoy immunity from antitrust laws. See Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). Plaintiffs challenge Bar Association proceedings which have beene stablished under the authority of the Ohio Supreme Court. Consequently, Plaintiffs' antittrust claims must be evaluated under the "state action doctrine."

The state action doctrine was created in recognition of the fact that federal antitrust laws were not meant to preclude state policies and regulation. Parker v. Brown, 317 U.S. 341 (1943). To gain state action immunity: (1) the state must clearly articulate and affirmatively express that the challenged restraint is its policy; (2) the state must actively supervise the challenged conduct. California Retail Liquor Dealers v. Midcal Aluminum, Inc., 445 U.S. 97 (1980).

As discussed, supra, the Ohio Supreme

Court has articulated a policy of bar association investigations. The first prong of the Midcal test is satisfied.

The Supreme Court recently held that a physician peer review process did not meet the requirements of the state action doctrine, but the Court reserved the question of whether judicial review of private conduct could ever satisfy the second prong of the Midcal test, "active supervision." Patrick v. Burget 486 U.S. 94,104 (1988). In the present situation, other courts have found that state supreme courts provide sufficient supervision over bar association proceedings. See Richardson, 1990-92 Trade Cas. (CCH) P 69,111; Hefner, 779 F.2d 277. See generally Hoover v. Ronwin, 466 U.S. 558 (1984) (state action immunity found for bar admission requirements).

While the Ohio Supreme Court does not play a large role at this juncture in the Bar Association investigation of Plaintiffs, it ultimately determines if and what sanctions

are necessary. Ohio S.Ct. Rule (V)(22). This Court finds that the Ohio Supreme Court does supervise the Bar Association.

The Court finds it unnecessary to consider the Eleventh Amendment and immunity issues presented by Defnedants.

Therefore, Defendants' motions to dismiss are GRANTED. IT IS SO ORDERED.

/s/ Frank J. Battisti
Frank J. Battisti
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

(Filed on October 19, 1991)

SANFORD J. BERGER, et al.	( )	1:90 CV 119
Plaintiffs	( )	
- vs -	( )	ORDER
THE CUYAHOGA COUNTY BAR ASSOCIATION, et al.	( )	
Defendants	( )	

Battisti, J.

Before the Court is Plaintiffs' motion to amend or alter judgment. For the reasons set forth below, the Court denies Plaintiffs' motion.

This case involved an effort on the part of Plaintiffs, attorneys Sanford J. Berger and Robert M. Fertel, to enjoin a disciplinary proceeding brought against them by Defendant Cuyahoga County Bar Association. The Court earlier granted Defendants' motions to dismiss. See Order of September 19, 1991.

In their present motion, Plaintiffs essentially seek reconsideration and reversal of this Court's previous decision. They present the same principal arguments raised and rejected earlier: (1) state bar associations disciplinary proceedings generally are pre-empted by and interfere with federal civil rights statutes; and (2) the ongoing investigation of their fee arrangements in this particular matter is infected with bad faith.

Again, Plaintiffs are unable to distinguish Supreme Court precedent that is directly on point, standing for the proposition that federal courts should not interfere with state bar association disciplinary proceedings. Middlesex Ethics Committee v. Garden State Bar Association, 457 U.S. 423 (1982). Furthermore, Plaintiffs are unable to satisfy the requirements for either pre-emption or bad faith.

Both parties, in anticipation of an appeal, also seek clarification of the

Court's Order with regard to Plaintiffs' claims for monetary relief.

The Sixth Circuit has stated that even when abstention principles apply to equitable claims, they are not necessarily appropriate for monetary claims. Thus, in a case involving state agency investigation of the plaintiff's physician, his "claims for monetary relief and attorney[] fees should have been stayed rather than dismissed unless they can be redressed in the state proceeding." Watts v. Burkhart, 854 F.2d 839,849 (6th Cir. 1988) (citing Deakins v. Monaghan, 484 U.S. 193 (1988)). Compare Litteral v. Bach, 869 F.2d 297 (6th Cir. 1989) (abstention applicable to neither equitable nor monetary claims).

in the present case, Plaintiffs' claims for monetary relief have been evaluated separately. They need not be stayed because they must be dismissed for reasons unrelated to abstention.

The Court held that Plaintiffs' federal

antitrust claims were barred by the "state action doctrine." Order at 11-13. The Plaintiffs' constitutional claims, however, are not affected by the state action doctrine. The constitutional claims are properly resolved on grounds of immunity. See Sparks v. Character and Fitness Committee of Kentucky, 859 F.2d 428 (6th Cir. 1988). cert. denied 489 U.S. 1011 (1989).

Sparks involved a challenge to bar admission requirements. The Sixth Circuit, after remand from the Supreme Court, held that considering bar applications was "[a] 'judicial act' to which absolute immunity attached." Id. at 434. Even if the immunity here were not absolute but merely qualified, Plaintiffs have not overcome it.

The only complication is dicta which, taken out of context, reads,"Judicial immunity has not been granted to judges promulgating a code of conduct for attorneys." Id. at 432 (citing Supreme Court of Virginia v.

Consumers Union of United States, 446 U.S. 719 (1980). The statement could be interpreted to deny immunity in situations such as the instant case, where state courts and state bar associations are not setting standards for individuals wishing to join the bar but rather for their conduct once members. But such an anomolous result is unnecessary. A careful reading of the cases indicates that the correct interpretation does not affect immunity in this context.

in the Sparks opinion itself, for example, the Sixth Circuit cited with approval cases granting immunity to "memberts of an attorney disciplinary committee" and "a state bar association conducting disciplinary proceedings." Sparks, 859 F.2d at 43-31 (citing Simons v. Bellinger, 643 F.2d 774 (D.C. Cir. 1980) and Clark v, State of Washington, 366 F.2d 678 (9th Cir. 1966).

The Supreme Court case from which the seemingly contrary language is taken concer-

ned a constitutional challenge to attorney advertising regulations. Most importantly for present purposes, the Court held, inter alia, that the defendant state supreme court was immune from damages liability. Consumers Union, 446 U.S. at 736.[1]

While the Court remains concerned that the actions of the Defendants have the potential to affect federal civil rights litigation, and though the Court notes that the Bar Association has not always behaved in an ideal manner, Plaintiffs have had and will continue to have opportunities to raise their objections throughout the established grievance and invesitgation process. This Court, moreover, cannot assume that the Defendants will disregard their duty to stay within constitutional and legal restraints in carrying out their functions. Plaintiffs have not provided any reason to believe that the Ohio Supreme Court, in its role of ultimately evaluating bar association disciplinary dec-

isions and sanctions, will be prejudiced or otherwise unable to adjudicate the claims they have raised.

finally, the Court notes parallels between the present case and In Re Ruffalo. 390 U.S. 544 (1968). In the earlier case, the petitioner was an attorney who had an active practice within the area of the Federal Employers' Liability Act (FELA). A local bar association had disbarred him, but this Court found that he had not engaged in any misconduct.

The Supreme Court eventually held: "Though admission to practice before a federal court is derivative from membership in a state bar, disbarment by the State does not result in automatic disbarment by the federal court. Though the state action is entitled to respect, it is not conclusively binding on the federal courts." Id. at 547 (citation omitted). In part because the state bar association cannot determine the Plaintiffs'

professional status before this Court, this Court likewise is reluctant to interfere with bar proceedings.

Accordingly, the Plaintiffs' motion to amend or alter the judgment is DENIED. Their claims for monetary relief remain DISMISSED.

IT IS SO ORDERED.

/s/ Frank J. Battisti
Frank J. Battisti
United States District Judge

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1 Although the Supreme Court also permitted suit for declaratory and injunctive relief in Consumers Union, its decision allowed an attack on the state bar regulations generally rather than an appeal of a decision in a particular case. That is, the distinction between Consumers Union on the one hand, and Middlesex and the instant case on the other, is not between bar admission and bar discipline but between a general claim and a specific one. See District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983).

UNITED STATES CONSTITUTION

Supremacy Clause, Article VI, Clause 2

This Constitution and the Laws of the United States which shall be made in pursuance thereof; ..., shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, ..., nor be deprived of life, liberty, or property, without due process of law; ...

42 U.S.C. Section 1988
(in pertinent part)

In any action or proceeding to enforce a provision of sections ... 1981 of the Revised Statutes [42 USCS §§1981-1983, 1985, 1986], ... or title VI of the Civil Rights Act of 1964 [42 USCS §§1681 et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.